APPENDIX

"It seems to me that the question of ownership here is not too relevant. The question is who supplied the tractor to Salinger. I don't think there is any doubt that the company did sell it" (S. R. p. 861, l. 12).

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, 151, *et seq.*:	
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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 478

NU-CAR CARRIERS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 425) is reported at 189 F. 2d 756. The decision and order of the Board (R. 355a-362a, 305a-335a) are reported at 88 NLRB 75.

JURISDICTION

The opinion of the court below was filed June 13, 1951 (R. 425), and a petition for rehearing was denied on September 18, 1951 (R. 433). The petition for a writ of certiorari was filed on December 14, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

Whether substantial evidence supports the Board's findings, sustained by the court below, that certain "owner-operator" truck drivers were employees of petitioner and not independent contractors within the meaning of the Act, and that petitioner, to discourage its drivers from engaging in concerted activities designed to terminate the "owner-operator" system, discharged driver Salinger and threatened other drivers with similar reprisal.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*), are set forth in the Appendix, *supra,* pp. 18-19.

STATEMENT

A. The facts as found by the Board

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on January 13, 1951, issued its findings of

fact, conclusions of law, and order. The pertinent facts may be summarized as follows:

1. *The owner-operator arrangement.* Petitioner is a common carrier, engaged in the business of transporting new automobiles by tractor-drawn trailer from a number of assembly plants of the Ford Motor Company to new car dealers (R. 308a; 19a-20a).[1] Petitioner's Raritan terminal, which alone is involved in the present case, was established about April 13, 1948, to service a Lincoln-Mercury assembly plant which the terminal adjoins (R. 309a; 34a-35a, 172a-173a). All of petitioner's drivers at this terminal were employed under the so-called "owner-operator" arrangement (R. 309a; 60a, 209a-210a). This arrangement was adopted in accordance with a collective bargaining agreement between the Union[2] and petitioner, executed April 13, 1948, before the terminal had opened and before any drivers were engaged (R. 309a; 172a-173a). The agreement provided that petitioner recognize the Union as sole bargaining agent for its drivers and that all drivers used by petitioner at the terminal would be engaged under the owner-operator plan for a trial period of four months (R.

[1] The symbol "R" refers to the Transcript of Record. In the statement of facts found by the Board, page references preceding the semi-colon, where one appears, are to the Board's findings; page references following the semi-colon are to supporting evidence.

[2] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 469.

309a; 284a-287a, 172a-173a). If, at the end of the trial period, the Union considered the arrangement unsatisfactory it would be terminated and petitioner would operate on a "company owned" basis (R. 309a; 69a, 172a-173a, 287a). Under the agreement, petitioner guaranteed that the drivers would earn a minimum wage of eleven cents a mile after all operating expenses (R. 287a).

(a) *The sale and lease agreements.*

The terms of the "owner-operator" arrangement were embodied in two basic documents—an "Agreement of Sale" and "Lease of Equipment Agreement" to which the drivers were required to subscribe (R. 309a-310a; 288a, 299a). In the sale agreement, petitioner "sold" to the driver-applicant an auto tractor worth approximately $2000. The applicant deposited $200 and agreed to pay the balance within two years at a stated mileage rate out of his earnings (R. 310a; 299a-301a). The obligation was evidenced by an interest-free note (R. 295a). In the lease agreement, which the driver was required to execute contemporaneously (R. 300a), the driver agreed to lease back to petitioner the tractor which he had just "purchased" and to operate it for petitioner, in conjunction with a trailer which petitioner would supply, the expense of operation and maintenance to be borne by the driver. In return, petitioner agreed to pay the driver a stated compensation by the mile (R. 310a;

288a-294a). The sale agreement provided further that payments on the purchase note were to be suspended if petitioner failed to provide the driver with specified gross earnings (R. 300a-301a). Title in the tractor was vested in petitioner for the life of the agreements and petitioner had the option of purchasing it at its market value at the termination of the agreements (R. 356a, n. 2; 291a, 293a-294a).

The lease agreements gave petitioner the right to exercise "exclusive and direct supervision and control" over the drivers' operations (R. 311a; 289a). Under this agreement the driver could work only for petitioner; he promised to "work exclusively and loyally for the Company and [be] subject to call by the Company" at all times (R. 311a; 289a). The tractor was to be used solely "in handling business for the account of the Company" (R. 311a; 291a). Only employees were allowed to ride in the trucks (R. 291a).

Other terms of the agreements required the truckmen to obtain gas, oil, parts and maintenance at the company terminal (R. 311a; 292a). The drivers were forbidden to put any lettering or advertising on the tractor except as required by law or permitted by petitioner (R. 311a; 289a). The driver could not buy accessories for the tractor without specific prior approval by petitioner (R. 293a). They were required to charge all "road purchases" to the company and submit invoices

for deduction from the equipment rental compensation (R. 311a; 293a).

The agreements could be terminated at will by petitioner if the employee failed to "operate in harmony" with the company's interests. In any event, either party could terminate the agreements, for any cause, upon 10 days' notice (R. 311a; 201a, 294a).

(b) *The owner-operator arrangement in practice*

In the course of its business, petitioner contracted directly with the Ford Motor Company for carriage of the cars, and was paid directly by that company (R. 211a-212a). Upon receiving an order to move cars, petitioner's dispatcher would assign one of the owner-operators to do the hauling (R. 61a-62a). The driver would load the truck, deliver the cars, and upon completion of delivery he would, after a rest, report back for another load (R. 273a-274a).

Petitioner exercised to the fullest feasible measure its contractual right to control and supervise the operations of the owner-operators and the equipment.[3] The drivers were required to park the trucks overnight at the company lot (R. 117a-

[3] The tractors were all registered in the company's name and were operated under certificate of convenience issued to the company by the Interstate Commerce Commission (R. 59a-60a). As a rule, the only insignia which petitioner permitted on the trucks were the company's name and certain lettering required by law (R. 206a).

118a, 120a, 126a-127a, 174a). Drivers were forbidden even to drive the trucks home (R. 114a). Petitioner insisted that whenever possible, maintenance, repair, and fueling of tractors be done at its terminal (R. 312a; 117a, 173a)[4] where it maintained a gas pump and repair shop (R. 312a; 152a, 160a-161a, 168a-169a, 260a).

New drivers were placed on probation for a 30-day period during which petitioner instructed them in loading and unloading techniques and "took particular care in observing [their] work" (R. 28a, 96a, 98a, 171a). Thereafter, petitioner continued to supervise the drivers closely. Operating instructions were posted on a bulletin board; these were supplemented by verbal instructions given to each driver when he was hired. Additional specific instructions were issued by the dispatcher prior to each trip (R. 61a-62a, 173a). Occasionally, even driving routes were prescribed (R. 157a, 62a, 79a-80a).

Respondent operated a "safety patrol car" to check the performance of the men while on the road (R. 313a; 126a, 147a-148a, 213a-214a, 262a-263a). Drivers discovered violating company rules, I.C.C. regulations, or state laws were warned and in some instances discharged. One driver, caught speeding, was threatened with dismissal (R. 313a; 283a-284a, 131a-132a). Another was given

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[4] When on the road, the drivers patronized stations specified by the company and charged all such purchases to the company (R. 117a; 173a).

a termination notice, which was later rescinded, for using foul language to a dispatcher (R. 314a; 179a-182a). A third operator, believed to be "accident prone", was fired (R. 314a; 126a). Another was also fired because he gave his brother a ride in the tractor (R. 314a; 263a-265a, 267a-269a).

Because of the nature of the work the drivers were not required to report at any fixed time or work fixed hours (R. 313a; 177a). However, since the drivers were precluded by the lease agreement from working for anyone else (R. 289a), the drivers who wanted "to make a living" reported for work regularly (R. 117a). In this type of work, it was the practice to haul a load, rest, and report for another load (R. 273a). The company insured prompt delivery of the cars by reminding drivers who lagged of their contractual obligations to work "loyally for the Company" (R. 223a-224a, 289a).

The drivers' weekly earnings were computed by allowing them a certain amount of compensation based upon mileage travelled and number of cars hauled and subtracting therefrom the company's charge for maintaining the trucks in gas, oil, repairs and insurance. A further charge was made for amortization of the balance of the purchase price due on the truck (R. 310a; 108a-109a, 290a-293a). In no event, however, did petitioner pay a driver less than the guaranteed minimum wage of eleven cents per loaded mile after operating ex-

penses had been deducted (R. 287a). Petitioner deducted the regular employee social security and income taxes from the drivers' earnings and paid the employer's share of the Social Security taxes (R. 56a). As provided in the sale agreement, the note amortization charge was not deducted in any week where a driver's gross earnings fell below one hundred dollars (R. 300a-301a).

2. *The unfair labor practices.* Six of the 28 drivers hired by petitioner when it began operating in the spring of 1948, came to petitioner directly from jobs as auto haulers at Anchor Motor Freight Company, a neighboring carrier (R. 316a; 64a, 83a, 247a). Anchor's drivers were also represented by the Union (R. 316a; 275a-276a). Salinger, one of the six, was an active union committeeman at Anchor. For several months prior to his employment by petitioner, Salinger, who was highly critical of some of the Union's policies, and also of the owner-operator plan, had been on unfriendly terms with Packy Reilly, the Union's business agent (R. 316a-317a; 274a-280a).

On June 8, 1948, Salinger applied for a job at petitioner's terminal. Hopkins, the personnel director, explained to him that the owner-operator system was on trial at the terminal under the contract with the Union. He also stated that "I would like to keep lease[5] here and I know you fellows will

[5] The owner-operated system was frequently referred to as the "lease" or "lessee" system.

be more than willing to go along with me" (R. 319a; 69a). At the second interview a few days later, Hopkins told Salinger that Gene Reilly, Packy's brother and assistant, had warned him not to hire Salinger because he was a "union agitator and [would] blow the place up." Salinger reassured Hopkins that he was only interested in moving cars and Salinger was hired (R. 73a-74a). On the following morning, Salinger reported for work, deposited $200, received a new tractor, orally assented to the provisions of the sale and lease agreements and agreed to sign the forms when they were made available (R. 320a; 21a, 79a). At this time Hopkins told Salinger that Packy Reilly had called him that morning and stated that if Salinger tried to break up the lease system it was the company's fault since they had been warned. Hopkins went on to say "I told Packy Reilly if you tried to change our system here, or cause us any trouble or break up this lease system, I will fire you right out the front door" (R. 320a; 77a-78a). When Salinger expressed some doubt as to the advisability of going to work with "two strikes against him", Hopkins assured him that everything would turn out all right (R. 79a).

Before and after Salinger's employment by petitioner there was considerable discussion among petitioner's drivers concerning the merits of the owner-operator arrangement and whether it should be continued at the expiration of the four month

trial period (R. 320a-321a, 357a; 81a-85a, 99a-101a, 104a-105a, 116a, 117a, 133a-137a, 150a-151a, 165a-166a). In these discussions, which took place at the terminal and other driver meeting places, drivers voiced complaints about the system, particularly that their earnings were inadequate and that the tractors supplied by petitioner were defective (R. 177a-178a). On a number of occasions Hopkins asked Salinger to support the arrangement and warned him not to try to change the lease system (R. 321a; 84a-85a, 105a-106a, 110a-111a). On one occasion Hopkins told Salinger that they were having some trouble around the yard and warned him to "keep [his] mouth shut" (R. 84a-85a).

Late in June, 1948, the drivers held a meeting at the terminal to discuss a rumor that the Union had agreed to continue the owner-operator system beyond the four-month trial period. At their request, two of the drivers, Wood and Hoffer, went to the Union hall to check the accuracy of the story (R. 321; 137a-140a, 152a-154a, 176a-178a). The next day, Hopkins called Wood to his office and asked him what right he had to go to the Union and declared, "Wood, I believe you are an agitator, I believe you are going to cause me a lot of trouble, if you don't watch your step you will be fired. I made a very big mistake when I hired all of you Anchor fellows" (R. 322a; 140a).

Hopkins then summoned Hoffer to his office. He asked Hoffer what the trouble was. Hoffer stated

the men's grievances, and the interview ended (R. 322a; 177a-178a).

De Rasmi, another of the drivers, was also called to Hopkins' office. Hopkins demanded to know what he was doing at the Union hall. De Rasmi denied that he had gone to the hall, and after some argument, Hopkins, finally convinced, stated: "You are young. You look like a smart fellow. Play ball with me and we will take care of you" (R. 322a; 154a-155a).

On July 7, a week or two after Hopkins had interrogated Wood, Hoffer, and De Rasmi, Assistant Manager Steen, according to Salinger's testimony, called Salinger to his office and told him that as a probationary driver he was being discharged[6] on the instructions of the home office because of a bad previous employment record (R. 322a; 86a-88a). This action was taken despite the fact that Salinger was an experienced auto hauler (R. 80a), had been highly recommended by his previous employer (R. 73a) and had been complimented on his work by petitioner's officials on numerous occasions (R. 85a, 246a).

Although petitioner claimed at the hearing that Salinger was not discharged but had quit rather than execute the owner-operator forms when they were offered him (R. 322a; 44a-45a, 52a, 249a-

[6] That Salinger was discharged and did not quit is confirmed by the testimony of others as well. See, R. 123a-125a, 170a-171a, 256a-257a, 261a-262a.

250a), petitioner's assistant manager admitted, under cross-examination, that he had told a Board investigator prior to the hearing that Salinger had been discharged and did not suggest that he had quit (R. 322a-323a; 489a-490a, 29a-30a). A few days after Salinger's dismissal, Assistant Manager Steen told Luce, one of the drivers, that Salinger was fired because he was an agitator and that he too would be fired if he didn't keep his mouth shut (R. 323a; 149a-150a).

B. The Board's conclusions and order

As to the owner-operator plan.—The Board, applying the conventional common-law "right of control" standard, found that Salinger and the other owner-operators were employees and not independent contractors within the meaning of Section 2(3) of the Act.[7] It noted particularly that the agreements "under which the drivers operated, placed all essential controls over the equipment and the manner and details of the work performed, in the hands of [petitioner]" (R. 356a).

As to the unfair labor practices.—The Board concluded that petitioner, in violation of Section 8 (a) (1) of the Act, interfered with the right of its employees to discuss the merits of the owner-operator plan and to influence their Union to ter-

[7] Section 2(3) of the Act excludes from the definition of "employee" any individual having the status of an independent contractor.

minate it in accordance with the agreement. The Board further found that petitioner discriminatorily discharged Salinger in violation of Section 8 (a) (3) because it believed he was actively engaged with the others in opposing the plan (R. 328a-329a, 356a-358a). Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found, to reinstate the discharged employee with back pay, and to post the customary notices (R. 358a-360a).

C. Proceedings in the Court of Appeals

The court below held, as did the Board, that the common-law "right to control" test should be applied in determining the drivers' status as employees" or "independent contractors" under the Act (R. 425-426). Applying that test, the court held that the evidence amply warranted the Board's conclusion. It stated (R. 426): "The degree of control over the work of its drivers which respondent had the right to exercise under the 'sale' and 'lease' agreements is so great as to make the drivers clearly 'employees' within the coverage of the Labor Relations Act, and not independent contractors." The court also held that the evidence fully supported the Board's finding that petitioner had interfered with its employees' concerted activities and that it discharged Salinger because it believed he was engaging in concerted activities (R. 431). The court, therefore, enforced the Board's order in full.

ARGUMENT

1. Rejected by the court below as entirely without merit "even under the strictest of common law agency tests" (R. 428), petitioner's contention (Pet. pp. 4-13, 24-74), that its truck drivers should have been found to be "independent contractors" rather than "employees" poses no issue warranting review by this Court. *Finnegan* v. *Dimmitt-Rickhoff-Bayer Real Estate Co.*, 179 F. 2d 882 (C. A. 8), certiorari denied, 340 U. S. 823 (real estate salesmen); *Party Cab Co.* v. *United States*, 172 F. 2d 87 (C. A. 7), certiorari denied, 338 U. S. 818; *Economy Cab Co.* v. *Fahs*, 174 F. 2d 321 (C. A. 5), certiorari denied, 338 U. S. 818; *New Deal Cab Co.* v. *Fahs*, 174 F. 2d 318 (C. A. 5), certiorari denied, 338 U. S. 818 (taxicab drivers). The decision below expressly turns on the special "facts of this case" (R. 430). As the court below observed, "We do not, of course, lay down any rule applicable to all 'owner-operator' situations" (*Ibid.*).[8]

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[8] In view of the factual distinctions, deemed decisive by the court below (R. 430-431), between the instant case on the one hand, and *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704 and *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. A. 6), on the other, the conflict in result which petitioner claims is non-existent. Petitioner's suggestion (Pet. pp. 18-23) that Congress intended to exempt all truck drivers, as such, from the operation of the National Act and related legislation is refuted by the very materials which petitioner cites (Pet. 20, note 2), as well as by the relevant committee reports, which show that Congress intended to make the common law test controlling. H. Rep. No. 245, 80th Cong., 1st Sess., p. 18; H. Rep. No. 510, 80th Cong., 1st Sess., p. 32-33.

Review is particularly inappropriate here, where the factual questions have been resolved against petitioner by the concurrent determinations of the trial examiner, the Board and the court below, and where the challenge to the validity of the findings is plainly without substance. As the court below said (R. 428), if petitioner did not, by its own language, reserve the critical "right to control the manner and means of driving these tractor-trailers and loading and unloading them, there are not words in the English language capable of doing so."[9]

2. Apart from its contention that the drivers were independent contractors, petitioner does not challenge the Board's conclusion, sustained by the court below, that the concerted activities of the drivers, aimed at terminating the "owner-operator" arrangement, were protected by the Act. Petitioner's contention that the coercive statements

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[9] Petitioner's further contention that "the order of the Board is impossible of compliance" (Pet. pp. 78-81), is based largely upon petitioner's version of the facts, which the Board and the court below rejected. To the extent that petitioner complains because its exact liability may not now be measurable with mathematical precision, its complaint is premature. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, 569; *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952, 954 (C. A. 4). Certainly that circumstance does not relieve petitioner, a wrongdoer, from the obligation of rectifying, so far as it can, the effects of its illegal conduct. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 688; *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 662-663 (C. A. 2).

whereby it sought to interfere with those activities were protected by the First Amendment (Pet. pp. 77-78), is palpably without merit, and clearly does not warrant further review. *National Labor Relations Board* v. *La Salle Steel Company,* 178 F. 2d 829, 833 (C. A. 7), certiorari denied, 339 U. S. 963; *National Labor Relations Board* v. *Kropp Forge Co.,* 178 F. 2d 822, 827-829 (C. A. 7), certiorari denied, 340 U. S. 810.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of general importance warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1952

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV, Secs. 151, *et seq.*), are as follows:

Definitions

Sec. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
* * *

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